

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

<p>STATE OF OKLAHOMA,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>TYSON FOODS, INC., et al.,</p> <p style="text-align: center;">Defendants.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Case No. 05-cv-329-GKF(SAJ)</p>
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**STATE OF OKLAHOMA'S REPLY TO "THE CARGILL
DEFENDANTS' SEPARATE RESPONSE TO PLAINTIFFS' [sic]
MOTION TO EXPAND THE DISCOVERY PERIOD"**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State") respectfully replies to "The Cargill Defendants' Separate Response to Plaintiffs' [sic] Motion to Expand the Discovery Period" [DKT #1645] as follows:

1. The State seeks an expansion of the discovery period as to all discovery, not just document discovery

To the extent the Cargill Defendants suggest that the State is seeking to expand the discovery period only as to document discovery, this suggestion is incorrect, and the State incorporates by reference its argument set out in the "State of Oklahoma's Reply to 'Peterson Farms, Inc.'s Response in Opposition to Plaintiffs' [sic] Motion to Expand the Discovery Period, Docket No. 1418.'" *See* DKT #1665. The State seeks an expansion of the discovery period as to all discovery, including discovery conducted through depositions and interrogatories.

2. The Cargill Defendants' characterization of their document productions is misleading

In their Response, the Cargill Defendants make sweeping statements about their document productions. It is only when one carefully studies the footnotes to these sweeping statements, however, that the true nature of their document productions is revealed. For instance, on page 1 of their Response the Cargill Defendants sweepingly claim to have "produced all IRW contract grower files in their possession, regardless of date." (Emphasis added.) Studying the footnote that accompanies this claim, however, one discovers that in reality the Cargill Defendants have produced historic records for only those Illinois River Watershed growers who were active in 2002 or later years. For those Cargill growers in the Illinois River Watershed who were no longer active in 2002, historic records were not produced (with perhaps the exception of the records of a single grower).

Similarly, on page 6 of their Response the Cargill Defendants sweepingly claim to "have completed substantially all of their supplemental pre-2002 productions." (Emphasis added.) Studying the footnote that accompanies this claim, however, reveals something very different. The Cargill Defendants are, in fact, improperly withholding from production "approximately 200 boxes" "believed to contain documents relevant to corporate knowledge and/or the limited categories discussed during the parties' July 19, 2007 meet and confer." These documents are ones the Court has already ordered the Cargill Defendants to produce, *see* July 6, 2007 Order, and ones the Cargill Defendants have stated they have already agreed to produce. To hold these documents hostage since December 2007 pending the resolution of the State's Motion is flatly improper and highly prejudicial to the State's preparation of its case (including hampering the work of the State's expert witnesses).

Simply put, the Cargill Defendants' efforts to portray themselves as having been cooperative and compliant in their discovery obligations amounts to nothing but wordsmithing. The reality of the Cargill Defendants' conduct is something quite different.

3. The Cargill Defendants incorrectly characterize the results of the post-July 6, 2007 meet and confer session

The Cargill Defendants would have this Court believe that some final agreement was reached between the State and the Cargill Defendants following the July 19, 2007 meet and confer session, and that the State forever waived its right to request that the Cargill Defendants produce additional historic documents in any additional categories other than those set out in Ms. Hill's August 2, 2007 letter to Messrs. Nance and Hammons. The Cargill Defendants' assertion is not only inaccurate, it does not square with Ms. Hill's August 2, 2007 letter itself. In fact, that letter explicitly acknowledges that "[d]uring the meet and confer, the State's requests for document production with regard to date was confined to a discussion of the contract grower files, flock evaluation reports and breeder farms. However, the State reserved the question of whether there were other categories of documents (as described in the Cargill Defendants' production letters and detailed index provided to the State) from which the State would like documents produced prior to 2002."¹ See pp. 2-3 of Ex. 2 to Cargill Defendants' Response (emphasis added). This fact is confirmed by Mr. Nance's January 3, 2008 letter to Mr. Jones, wherein he points out that "[n]othing in Ms. Hill's letter of August 2, 2007, evidences an agreement, and that letter explicitly reserves the right to make a final determination of cost and burden of discovery. Thus, that letter itself negates any inference of a completed agreement."

¹ With respect to this index, it should be pointed out that it is an "index of their produced documents." See Response, p. 3. Thus, it is useful only insofar as it reflects the types of documents that have already been produced, not the entire universe of documents that actually are available.

Clearly, as reflected by Ms. Hill's August 2, 2007 letter, there is no agreement with the Cargill Defendants that precludes the State's Motion. The Cargill Defendants' efforts to avoid producing relevant, responsive discovery (in any or all its forms) should not be credited.

4. Information about the Cargill Defendants' historic operations in the Illinois River Watershed is relevant

The Cargill Defendants' assertion that the State's Motion does not adequately address the issue of relevance of the Cargill Defendants' historic operations in the Illinois River Watershed ignores the fact that the State attached to its Motion the un rebutted affidavit of Shanon J. Phillips, and that the affidavit does in fact establish (1) that past poultry waste land application has caused past contamination in the Illinois River Watershed, and (2) that past poultry waste land application is causing present contamination in the Illinois River Watershed.

The Cargill Defendants' assertion that Ms. Phillips is unqualified to offer opinions on these matters is belied by the fact that she is Assistant Division Director of Water Quality Division of the Oklahoma Conservation Commission ("OCC"), that she has written many reports on the Illinois River Watershed during her time at OCC and analyzed much of the data collected by the OCC and many other agencies, *see* Phillips Aff., ¶ 1, that she has regularly presented this data at technical meetings both within the State and across the country, *see* Phillips Aff., ¶ 1, and that she is recognized by her peers for her knowledge of the water quality issues in the Illinois River and similar watersheds. *See* Phillips Aff., ¶ 1. In fact, Exhibit 1 to the State's Motion for Preliminary Injunction was a report authored by Ms. Phillips. Moreover, the Cargill Defendants' counsel cross-examined Ms. Phillips at deposition on January 17, 2008, on the topics of non-point-source pollution and the effects of best management practices. Notably, during that deposition, the Cargill Defendants' counsel did not question Ms. Phillips' qualifications even once.

The Cargill Defendants' assertion that Ms. Phillips has not provided scientific support for her opinions is similarly belied by the contents of the affidavit itself. *See Phillips Aff.*, ¶¶ 3-10.

Simply put, Ms. Phillips' un rebutted affidavit does establish the relevancy of the sought-after discovery, and in further response to the Cargill Defendants' arguments, the State incorporates by reference the arguments made in the "State of Oklahoma's Reply to 'Peterson Farms, Inc.'s Response in Opposition to Plaintiffs' [sic] Motion to Expand the Discovery Period, Docket No. 1418.'" ² *See* DKT #1665.

5. Expanding the discovery period would not unfairly burden the Cargill Defendants

The State has provided un rebutted evidence that the historic information it seeks is highly relevant to the claims it is asserting. In response, the Cargill Defendants contend that providing such information would be burdensome and costly. Such contentions should be viewed with a grain of salt. As explained in *Zapata v. IBP, Inc.*, 1994 WL 649322, *3 (D. Kan. Nov. 14, 1994), "[a]ll discovery, of course, is to some extent burdensome." Likewise, as explained in *Segarra v. Potter*, 2004 WL 3426438, *8 (D.N.M. April 5, 2004), "[a]ll discovery imposes a cost." Given

² The Cargill Defendants also assert that the State's Motion does not satisfy this Court's request for "extensive briefing on the legal issues presented." (Emphasis added.) Contrary to the Cargill Defendants' assertion, however, the State has briefed the relevancy standard and again pointed out that the statute of limitations does not run against the State. There is little for the State to reply to when the Cargill Defendants fail to even respond to the State's legal authority with any countervailing legal authority of their own.

In fact, it is telling that the only two cases that the Cargill Defendants cite in support of their contention that the State's discovery is overbroad are distinguishable in that they did not involve historic conduct causing non-timed-barred historic injuries or historic conduct causing present injuries. Further, it should be noted that one of the two cases relied upon by the Cargill Defendants, *Williams v. Sprint / United Management Co.*, 2006 WL 2734465 (D. Kan. Sept. 25, 2006), was overruled for the proposition cited. *See Williams v. Sprint / United Management Co.*, 2006 WL 33256840 (D. Kan. Nov. 9, 2006) (granting plaintiff's discovery motion, "the court conclude[d] that the magistrate judge erred in concluding that the Requests are facially overly broad and, thus, erred in failing to require defendant to substantiate its objections").

the importance of this discovery to helping establish elements of the State's claim against Defendants, including the Cargill Defendants, any burden or cost is outweighed by relevancy.

Further, the Cargill Defendants' attempt to blame the State for the present situation should not be credited. Specifically, the Cargill Defendants assert that all the State needed to do to avoid the present Motion would have been to identify the categories of historic documents it wanted last summer. This assertion is specious, particularly since the Cargill Defendants could have just as easily avoided any additional burden and costs associated with the provision of the sought-after historic information by merely providing the information in the first instance and not raising their frivolous temporal objections.

Conclusion

For all the reasons set forth in the State's Motion and above, the State's Motion to Expand the Discovery Period to include all responsive information pertaining to the Illinois River Watershed, regardless of its age, should be granted.

Respectfully Submitted,

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